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The Jocks and the Justice: How Sotomayor Restrained College Athletes

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THE JOCKS AND THE JUSTICE: HOW SOTOMAYOR RESTRAINED COLLEGE ATHLETES

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I. INTRODUCTION

Two judicial opinions have shaped the modern college athletic world.[1] *NCAA v. Board of Regents of the University of Oklahoma*[2] declared the NCAA's exclusive control over the media rights to college football violated the Sherman Act.[3] That decision allowed universities and conferences to control their own media revenue and laid the foundation for the explosion of coverage and income in college football today.[4] *Clarett v. NFL* held that the provision then in the National Football League's (NFL) Constitution and By-Laws that prohibited players from being eligible for the NFL draft until three years from the date of their high school graduation was immune from Sherman Act liability because it was protected by the non-statutory labor law exemption.[5] An earlier decision, *Haywood v. NBA*,[6] declared the National Basketball Association's (NBA) age-based draft eligibility rule an illegal group boycott and a per se violation of the Sherman Act.[7] Therefore, at the time of the *Clarett* decision, the NFL was

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1. Although this Article only deals with football and basketball, these two sports provide most of the income for college athletic departments and support almost all other college sports. Therefore, significant developments in those two sports can be fairly characterized as influencing all of collegiate athletics. *See* Kristi Dosh, *Does Football Fund Other Sports at College Level?*, FORBES (May 5, 2011), http://www.forbes.com/sites/sportsmoney/2011/05/05/does-football-fund-other-sports-at-college-level/.

2. *See generally* 468 U.S. 85 (1984).

3. *Id.* at 88 (referencing 15 U.S.C. § 1 et seq. (2016)).

4. The NCAA case is beyond the scope of this Article.

5. Clarett v. NFL (*Clarett II*), 369 F.3d 124, 125 (2d Cir. 2004).

6. 401 U.S. 1204, (1971).

7. *Id.* at 1205–07. The Court in *Haywood* did not consider the non-statutory labor exemption.

the only professional league that had age-based eligibility rules.[8]

Young talent in sports fascinates the American public. Bryce Harper and Mike Trout dominate discussion of the best all-around player in Major League Baseball. Ginger Howard makes headlines as an eighteen-year-old member of the Ladies Professional Golfers Association. Connor McDavid is an eighteen-year-old left wing drafted first by the Edmonton Oilers in the 2015 National Hockey League Draft. Leonard Fournette, a nineteen-year-old running back at Louisiana State University, makes the cover of ESPN and Sports Illustrated. Karl-Anthony Towns and Jahlil Okafor dominate college basketball as freshmen and then become the first and third picks in the 2015 NBA Draft.

However, collegiate football and basketball players are treated differently from athletes in all other sports in the modern legal reality. Although Fournette is widely acknowledged as being NFL ready and he risks his earning potential with every carry, he cannot become an NFL player until a certain amount of time has passed since his high school graduation—maybe. Article 6, section 2(b) of the NFL Collective Bargaining Agreement (CBA) states:

> No player shall be permitted to apply for special eligibility for selection in the Draft, or otherwise be eligible for the Draft, until three NFL regular seasons have begun and ended following either his graduation from high school or graduation of the class with which he entered high school, whichever is earlier.[9]

As written, the provision does not give a player with three years of college football experience a right to enter the draft—it only allows him to petition for a special exemption. Although no third-year player has in fact been denied, the college football player only receives unconditional eligibility for the draft three years after his high school graduation and the exhaustion of his college eligibility or four years after his high school graduation.[10]

The NBA is kinder to young talent by providing both an unqualified and a shorter period of eligibility for its draft. The NBA CBA provides that an eligible player must be at least nineteen years of age during the calendar year of the draft

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8. Alan C. Milstein, *The Maurice Clarett Story: A Justice System Failure*, 20 ROGER WILLIAMS U. L. REV. 216, 225 (2015).

9. NFL COLLECTIVE BARGAINING AGREEMENT art. 6, § 2(b) (2011), https://nflpaweb.blob.core.windows.net/media/Default/PDFs/General/2011_Final_CBA_Searchable_Bookmarked.pdf [hereinafter NFL CBA].

10. *See The Rules of the Draft*, NFL FOOTBALL OPERATIONS, http://operations.nfl.com/the-players/the-nfl-draft/the-rules-of-the-draft/ (last visited June 9, 2016). However, because almost no player exhausts his eligibility in three years, this is, in effect, a four-year from high school graduation rule.

and at least one NBA season must have passed since the player's high school graduation.[11] The NBA CBA also states, "The player has expressed his desire to be selected in the Draft in a writing received by the NBA at least sixty (60) days prior to such Draft (an "Early Entry" player)."[12] However, the NBA owners proposed in the collective bargaining process of 2011 that the age limit be raised to twenty years old.[13] The proposal was not embodied in the final CBA. However, new NBA Commissioner Adam Silver announced his support for increasing the draft eligible age to twenty in his first press conference as Commissioner.[14] Colleges and universities continue to pressure the NBA to increase the age and number of NBA seasons since high school graduation for draft eligibility.[15] Because the draft eligibility rule in both sports is now included in the leagues' respective CBAs, any change to either at this point would require the consent of the respective players' unions.

How are these restrictions valid? Why can football and basketball players not earn a living with their skills—like every other athlete and American worker can? The *Clarett* opinion, authored by then Second Circuit Judge Sotomayor, confirmed the validity of eligibility restrictions in the NFL (and by implication the NBA)[16] and has not been seriously questioned since the date of the decision.[17] The influence of the opinion is at least partly explained by its author's appointment to the United States Supreme Court. Judge Sotomayor held that the NFL's eligibility requirements were immune from the Sherman Act because they fell within the purview of federal labor law.[18] The *Clarett* opinion therefore never reached the antitrust analysis that produced the decision in *Haywood*.

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11. NBA COLLECTIVE BARGAINING AGREEMENT art X, § 1(b)(i) (2011), http://nbpa.com/cba/ [hereinafter NBA CBA].

12. *Id.* art X, § 1(b)(ii)(F). The CBA lists under section 1(b)(ii) a variety of circumstances that make a player eligible for the draft. *See id.* art X, § 1(b)(ii). Subsection (F) is the only one applicable to this Article.

13. Michael A. McCann, *Justice Sonia Sotomayor and the Relationship Between Leagues and Players: Insights and Implications*, 42 CONN. L. REV. 901, 904 (2011). The NBA has been pressured for years to raise the eligibility limits to two years from high school graduation and twenty years old. *See id.*

14. Howard Beck, *New Commissioner Adam Silver Argues Minimum Age of 20 Better for NBA, NCAA Games*, BLEACHER REP. (Feb. 15, 2014), http://bleacherreport.com/articles/1961874-new-commissioner-silver-argues-minimum-age-of-20-better-for-nba-and-ncaa-games.

15. Jake New, *Done with One-and-Done?*, INSIDE HIGHER ED (Feb. 23, 2015), https://www.insidehighered.com/news/2015/02/23/conferences-weigh-freshman-ineligibility-rule-basketball-players.

16. Clarett v. NFL *(Clarett II)*, 369 F.3d 124, 125 (2d Cir. 2004).

17. The NBA adopted its current age-based draft eligibility restriction in its 2005 CBA. Christian Dennie, *From Clarett to Mayo: The Antitrust Labor Exemption Argument Continues*, 8 TEX. REV. ENT. & SPORTS L. 63, 74 (2007). That CBA was finalized on July 29, 2005, fourteen months after the *Clarett* decision. *Id.*

18. *Clarett II*, 369 F.3d at 125.

The stability of college football and basketball as currently constituted depends on continued acceptance of the *Clarett* opinion. If the *Clarett* result is overturned, college basketball loses many of its young stars. The effect on college football would be unprecedented as talented players could never play collegially or leave the college game whenever they wanted. The impact on elite teams would be magnified, as the star players would be the most likely early departures. Because most college athletic departments are dependent on the revenue from basketball and football,[19] a decrease in income from those sports due to a lack of marquee players would affect the very existence of other collegiate sports.

Clarett was, in fact, wrongly decided in 2004. The result it produced is even less defensible for the current NFL and NBA. While the opinion saved college football and basketball, its legal reasoning is seriously flawed. The failure to consider the relationship between the NFL and the NCAA constitutes its biggest deficiency.[20] The NFL eligibility rule is much more that a restraint on a class of prospective players. The restraint supports the financial structure of college football and saves each NFL team millions of dollars in developmental costs. This conspiracy inhibits entry-level competition in professional football and allows both the universities and the NFL to enjoy monopolistic profits at the expense of college football players. The predatory effect of the NFL's group boycott is even more pernicious when draft eligibility is denied to college players unquestionably ready to play in the NFL. Their ability to profit from their skills is delayed strictly to protect the financial interests of the NFL and the NCAA Division I universities.

The second section of this Article briefly reviews the history of the non-statutory labor law exemption. The third section describes both the district court and Second Circuit opinions in *Clarett*. The fourth section argues that the Second Circuit misunderstood the nature of NFL's eligibility rule and misapplied its sports law precedent. The fifth section argues that Judge Sotomayor improperly applied what was effectively the preemption test employed in the seminal sports law case of *Mackey v. NFL*.[21] The final section of the Article demonstrates that, if the exemption does not apply, the eligibility provisions do, in fact, violate the Sherman Act.

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19. *See* Dosh, *supra* note 1.

20. The *Clarett* case only concerned the NFL. *See generally Clarett II*, 369 F.3d 124. As such, this Article speaks mainly of the NFL. However, all the legal analysis contained herein applies equally to the NBA.

21. *See generally* 543 F.2d 606 (8th Cir. 1976).

II. THE NON-STATUTORY LABOR LAW EXEMPTION

The non-statutory labor law exemption was created by the Supreme Court to effectuate the statutory exemption from antitrust liability provided by Congress for union activity.[22] After Supreme Court decisions held that unions were a violation of the Sherman Act,[23] the Clayton Act provided, in relevant part, that labor unions are not illegal combinations in restraint of trade.[24] Subsequently, the Norris-LaGuardia Act further restricted the equity jurisdiction of federal courts in matters involving a "labor dispute."[25] The Supreme Court expanded this exemption for unilateral union activity to include collectively bargained, joint management-labor agreements in *Allen Bradley Co. v. Local Union No. 3, International Brotherhood of Electrical Workers*.[26] The Supreme Court later explained the nature of the exemption in *Local Union No. 189, Amalgamated Meat Cutters v. Jewel Tea Co.*:

> Thus the issue in this case is whether the marketing-hours restriction, like wages, and unlike prices, is so intimately related to wages, hours and working conditions that the unions' successful attempt to obtain that provision through bona fide, arm's-length bargaining in pursuit of their own labor union policies, and not at the behest of or in combination with nonlabor groups, falls within the protection of the national labor policy and is therefore exempt from the Sherman Act. We think that it is.[27]

Other Supreme Court cases indicated that the exemption would not apply if the union participated in the competitive interests of the employer[28] or if the agreement restrained the business or product market to an extent not justified by a union's fundamental interest in eliminating competition among employees regarding wages and working conditions.[29]

The exemption only applies to complaints alleging violations of federal

22. United States v. Hutcheson, 310 U.S. 219, 236–37 (1941).

23. *See generally, e.g.*, Duplex Printing Press Co. v. Deering, 254 U.S. 443 (1921); Loewe v. Lawlor, 208 U.S. 274 (1908).

24. *See generally* Clayton Act of 1914, 15 U.S.C. §§ 12–27 (2016).

25. Norris-LaGuardia Act of 1932, 29 U.S.C. §§ 104–05, 113 (2016).

26. *See generally* 325 U.S. 797 (1945). This case created the non-statutory labor exemption.

27. 381 U.S. 676, 689–90 (1965) (footnote omitted).

28. *See, e.g.*, United Mine Workers of Am. v. Pennington, 381 U.S. 657, 665–66 (1965).

29. *See, e.g.*, Connell Constr. Co. v. Plumbers & Steamfitters Local Union No. 100, 421 U.S. 616, 625–26 (1975).

antitrust statutes, most notably the Sherman Act. The exemption's application to lawsuits against employers by employees has primarily occurred in the context of sports litigation.[30] *Mackey v. NFL* involved a lawsuit by NFL players against the league alleging that the Rozelle Rule was a violation of the Sherman Act.[31] The Rozelle Rule allowed the Commissioner of the NFL to provide any team that lost a free agent player to another team with compensation that the Commissioner, in his sole discretion, determined to be appropriate.[32] The players argued that the imposed compensation was a per se violation of section 1 of the Sherman Act or, in the alternative, a violation of the Rule of Reason, which emanated from the same statutory provision.[33] The Eighth Circuit expanded the exemption by initially ruling that the immunity applied to the CBA, not just the union, and therefore the NFL could also assert the exemption as the management signee.[34] The opinion then delineated a three-part test for the exemption's applicability:

> 1. "the restraint on trade primarily affects only the parties to the collective bargaining relationship"; and
>
> 2. "the agreement sought to be exempted concerns a mandatory subject of collective bargaining" (i.e., wages, hours, or terms and conditions of employment); and
>
> 3. "the agreement sought to be exempted is the product of bona fide arm's-length bargaining."[35]

The Eighth Circuit then concluded that the Rozelle Rule did satisfy the first two criteria of its test but was not the product of bona fide arm's length bargaining.[36] Therefore, the NFL's liability under section 1 of the Sherman Act needed to be assessed.[37] The *Mackey* opinion then stated that the per se rules of section 1 should not be applied to the NFL given the uniqueness of professional

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30. *See* Phillip J. Closius, *Not at the Behest of Nonlabor Groups: A Revised Prognosis for a Maturing Sports Industry*, 24 B.C. L. REV. 341, 348 (1983).

31. Mackey v. NFL, 543 F.2d 606, 609 (8th Cir. 1976).

32. *Id.* at 610–11.

33. *Id.* at 609–10.

34. *Id.* at 612.

35. *Id.* at 614 (citing Connell Co. v. Plumbers & Steamfitters Local Union No. 100, 421 U.S. 616 (1975); Local Union No. 189, Amalgamated Meat Cutters v. Jewel Tea, 381 U.S. 676 (1965); United Mine Workers v. Pennington, 381 U.S. 657 (1965); Smith v. Pro Football, 542 F. Supp. 462 (D.D.C. 1976); Phila. World Hockey Club v. Phila. Hockey Club, 351 F. Supp. 462, 496–500 (E.D. Pa. 1972)).

36. *Id.* at 615–16.

37. *Id.* at 616.

sports as an industry.[38] The Eighth Circuit finally concluded by holding that the Rozelle Rule violated the Rule of Reason liability standard of section 1.[39] The *Mackey* three-part test delineating the exemption's applicability has been adopted by other circuits.[40]

The Supreme Court decided a post-*Mackey* case involving the exemption and professional football in *Brown v. Pro Football, Inc.*[41] In that decision, the Supreme Court resolved an issue that had confounded the Circuits—did the exemption apply to provisions unilaterally imposed by an employer after the expiration of the applicable CBA? In negotiations to create a new CBA, the NFL and the National Football League Players Association (NFLPA) had reached an impasse.[42] The owners had proposed a developmental or practice squad, and the NFLPA wanted such players to be free to negotiate their own compensation packages.[43] The NFL wanted to impose a set salary scale for all such players.[44] Following impasse, the NFL unilaterally imposed its wage scale.[45] Brown, a practice squad player, initiated an antitrust lawsuit against his team for refusing to bargain with him.[46] The Supreme Court ruled against Brown by holding that the exemption continues after impasse as long as the term was the product of the collective bargaining process and the employer and union remained in a collective bargaining relationship.[47] Although the *Brown* opinion does not cite the *Mackey* decision, the *Brown* description of the appropriate application of the exemption appears to mirror the three-part *Mackey* test:

> That conduct took place during and immediately after a collective-bargaining negotiation. It grew out of, and was directly related to, the lawful operation of the bargaining process. It involved a matter that the parties were required to negotiate collectively. And it concerned only the parties to the collective-bargaining relationship.[48]

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38. *Id.* at 619–20.

39. *Id.* at 622.

40. *See, e.g.*, Cont'l Mar. of S.F., Inc. v. Pac. Coast Metal Trades Dist. Council, Metal Trades Dep't, 817 F.2d 1391, 1393 (9th Cir. 1987); McCourt v. Cal. Sports, Inc., 600 F.2d 1193, 1196–97 (6th Cir. 1979); Zimmerman v. NFL, 632 F. Supp. 398, 403–04 (D.D.C. 1986).

41. *See generally* 518 U.S. 231 (1996).

42. *Id.* at 235.

43. *Id.* at 234.

44. *Id.*

45. *Id.* at 235.

46. *Id.*

47. *Id.* at 250.

48. *Id.*

The first two sentences quoted refer to the term being a product of good faith bargaining. The final two sentences incorporate the mandatory subject of bargaining and the aspect of only affecting parties to the relationship prongs of the *Mackey* test. The *Brown* decision therefore expands the duration of the exemption and appears to support *Mackey* as the test for the exemption's applicability.

III. THE DECISIONS IN *CLARETT*

Maurice Clarett was a highly recruited high school running back who eventually chose to enroll at the Ohio State University (OSU). He graduated from high school on December 11, 2001, and enrolled early at OSU. Clarett lived up to his reputation by becoming the first freshman running back starter at the school since 1943. He led his team to an undefeated season in 2002 and Ohio State's first national championship in thirty-four years, beating the University of Miami in the Fiesta Bowl in January 2003. Clarett was named Big Ten Freshman of the Year and the best running back in college football by The Sporting News. However, Clarett was suspended by OSU and the NCAA for the entire 2003 football season because he accepted impermissible benefits in violation of NCAA rules.[49] Clarett believed he would also be suspended for the 2004 football season.[50] Having already missed his sophomore season, Clarett feared that he would not be able to play football for two full years. Such a long absence would diminish his value to the NFL. Clarett then sued the league in an effort to be eligible for the 2004 NFL draft.[51]

The district court properly stated that the lawsuit turned on three major issues: (1) Did the non-statutory labor law exemption preempt the lawsuit because federal labor policy provided antitrust immunity for the eligibility restrictions at issue?; (2) If not, did Clarett lack standing because he had not suffered an antitrust injury?; and (3) If Clarett has standing, do the eligibility restrictions satisfy the Rule of Reason test imposed in sports cases to determine antitrust liability?[52] The district court answered all of these questions in the negative and granted summary judgment in favor of Clarett.[53]

In determining the reach of the exemption, the district court cited the

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49. *Clarett Allowed to Keep Scholarship*, ESPN (Sept. 11, 2003), http://espn.go.com/college-football/news/story?id=1612990.

50. Clarett v. NFL (*Clarett I*), 306 F. Supp. 2d. 379, 388 (S.D.N.Y. 2004).

51. *See id.*

52. *See id.* at 382.

53. *Id.*

three-part test enunciated in *Mackey*.[54] The opinion noted that the eligibility rules were not mandatory subjects of bargaining because the rule at issue precluded players from entering the labor market and therefore "affects wages only in the sense that a player subject to the Rule will earn none."[55] The district court also stated, "The exemption is also inapplicable because the Rule *only* affects players, like Clarett, who are complete strangers to the bargaining relationship."[56] Finally, the opinion concluded "the NFL has failed to demonstrate that the Rule evolved from arm's-length negotiations between the NFLMC and the NFLPA."[57] The rule did not arise from, nor was agreed to during, the process of collective bargaining.[58] The eligibility rule therefore failed all three prongs of the *Mackey* test and the exemption was inapplicable.[59]

The district court then determined that Clarett suffered an antitrust injury and therefore had standing.[60] His allegation that a group boycott precluded him, and all others similarly situated, from competing for a job in a defined market satisfied the injury requirement.[61] Clarett also explicitly alleged that the restraint at issue resulted from conduct by the defendants.[62] Clarett had standing because he was not alleging that he had lost an employment opportunity to another in a competitive job market.[63] He alleged that he and others like him "have been *foreclosed* from entering the market altogether. 'They are not losers in a competitive marketplace; they are not even allowed in the game.'"[64] The injury should be more pronounced for players like Clarett who are unquestionably qualified to play in the NFL.[65] The NFL's enforced delay is the injury.[66]

The district court then turned to the final issue described above—judging the viability of the eligibility rule pursuant to the Rule of Reason test under section 1 of the Sherman Act.[67] Under such an analysis, the plaintiff must show

54. *Id.* at 391.

55. *Id.* at 395.

56. *Id.*

57. *Id.* at 396.

58. *Id.*

59. *Id.* at 397.

60. *Id.* at 403–04.

61. *Id.* at 403.

62. *Id.*

63. *See id.*

64. *Id.* at 400 (quoting Plaintiff's Memorandum in Opposition to Defendant National Football League's Motion for Summary Judgment at 10, *Clarett I*, 306 F. Supp. 2d 379).

65. *See id.*

66. *See Clarett I*, 306 F. Supp. 2d at 401.

67. *Id.* at 404–07.

an actual adverse effect on competition.[68] If successful, the defendant may then demonstrate the pro-competitive benefits of their activity.[69] If defendants are successful, the plaintiff may then show that said benefits could be achieved by less restrictive alternatives—activities less harmful to competition.[70] Clarett met his burden by alleging that the group boycott at issue adversely restrained trade by the NFL's denial of market entry to certain sellers of services (i.e., players less than three years removed from high school graduation) in the market of professional football.[71] The NFL then offered four justifications for the eligibility rule based on protecting younger players and reducing its costs.[72] The district court dismissed the protection of younger player rationales out of hand by noting that, while there may be concerns, they have nothing to do with promoting competition in the market.[73] The economic justifications also failed because the NFL's desire to keep its costs down was not pro-competitive in any way—in fact, most antitrust violations are done because they inure to the financial benefit of the defendants.[74] The district court concluded by noting that, even if the justifications were pro-competitive, the ability to screen and test candidates for the NFL draft was a less restrictive alternative for accomplishing all the proffered justifications.[75]

On appeal, the Second Circuit reversed the lower court on the exemption issue and therefore did not reach the antitrust issues contained in the district court opinion.[76] The opinion began by characterizing the NFL as a multi-employer bargaining unit, an arrangement both provided for and promoted by federal labor law.[77] The court then reviewed the history of the non-statutory labor law exemption and the applicable Supreme Court precedent.[78] Judge Sotomayor then decided that the *Mackey* test was not appropriate for use in a case alleging a restraint on a labor market brought by employees rather than a restraint on a product market brought by other employers.[79] She specifically noted that Clarett did not contend that the eligibility rules worked to the disadvantage of the NFL's competitors in the

68. *Id.* at 404.
69. *Id.* at 405.
70. *Id.* at 405–06.
71. *Id.* at 406.
72. *Id.* at 408.
73. *Id.*
74. *Id.* at 408–09.
75. *Id.* at 410.
76. *See generally* Clarett v. NFL (*Clarett II*), 369 F.3d 124 (2d Cir. 2004).
77. *Id.* at 130.
78. *See generally id.* at 130–34.
79. *Id.* at 133–34.

market for professional football or in some manner to protect the NFL's dominance in that market.[80] The opinion then stated that the *Mackey* test should not be applied when "the plaintiff complains of a restraint upon a unionized labor market characterized by a collective bargaining relationship with a multi-employer bargaining unit,"[81] to which Judge Sotomayor cited *Wood v. NBA*,[82] *Caldwell v. American Basketball Ass'n*,[83] *NBA v. Williams*,[84] and *Brown v. Pro Football, Inc.*[85] to support this conclusion.

The Second Circuit then described the issue as "whether subjecting the NFL's eligibility rules to antitrust scrutiny would 'subvert fundamental principles of our federal labor policy.'"[86] A base principle of federal labor law was that, once a bargaining relationship was established, "prospective players no longer have the right to negotiate directly with the NFL teams over the terms and conditions of their employment."[87] Labor policy meant that "the NFL teams are permitted to engage in joint conduct with respect to the terms and conditions of players' employment as a multi-employer bargaining unit without risking antitrust liability."[88] The terms and conditions of Clarett's employment were therefore committed to the collective bargaining process in which the NFLPA has the labor law right to make concessions as it sees fit and to favor veterans over rookies if such a choice benefits the unit and is consistent with a union's duty of fair representation.[89] However, these general labor concepts were not controversial or actually in dispute in the lawsuit.

The critical part of the opinion began with Judge Sotomayor overruling the district court by holding that the eligibility rule was a mandatory subject of bargaining.[90] She first based this conclusion on her belief that the eligibility rule has "tangible effects on the wages and working conditions of current NFL players."[91] Proof of that effect was the complex collectively bargained for system of the NFL draft, salary pools for rookies, team salary caps, and free agency that combined to influence an individual player's compensation.[92] The

80. *Id.* at 134.
81. *Id.*
82. *See generally* 809 F.2d 954 (2d Cir. 1987).
83. *See generally* 66 F.3d 523 (2d Cir. 1995).
84. *See generally* 45 F.3d 684 (2d Cir. 1995).
85. *See generally* 518 U.S. 231 (1996).
86. *Clarett II*, 369 F.3d at 138 (quoting *Wood*, 809 F.2d at 959).
87. *Clarett II*, 369 F.3d at 138.
88. *Id.*
89. *Id.* at 139.
90. *Id.*
91. *Id.* at 140.
92. *Id.*

second justification for the holding was the reduction in competition in the market for entering players caused by the eligibility rule, which, in turn, affected the job security of veteran players.[93] "Because the size of NFL teams is capped, the eligibility rules diminish a veteran player's risk of being replaced by either a drafted rookie or a player who enters the draft and, though not drafted, is then hired as a rookie free agent."[94] The Second Circuit noted that "the preservation of jobs for union members is not violative [sic] of the anti-trust laws."[95] The opinion finished its analysis of this issue by concluding that simply because the eligibility rules harmed prospective players rather than current players did not make them violations of the Sherman Act.[96] Labor law rather than antitrust law must therefore control any challenge to a mandatory subject of bargaining, and labor law permitted the NFL and the NFLPA to agree that an employee will not be hired or considered for employment for nearly any reason whatsoever, which is not an unfair labor practice or an act of discrimination made illegal by statute.[97]

The opinion concluded by noting that the exemption applies even though the eligibility rule was not contained in the CBA.[98] The eligibility rule was in fact contained only in the NFL Constitution and By-Laws.[99] However, the NFLPA certainly was aware of the eligibility rule and a copy of the NFL Constitution and By-Laws was presented to the NFLPA during negotiations.[100] Because the eligibility rule was a mandatory subject of bargaining, the NFLPA could have forced the NFL to bargain on it and, for whatever reason, it did not do so.[101] In addition, the NFLPA agreed in the CBA to waive its right to challenge any provision in the NFL Constitution and By-Laws, effectively agreeing to the eligibility rule contained therein.[102] Labor law precluded any individual player from challenging the unique bundle of compromises made by the union in the collective bargaining process that produced the agreement.[103] The Second Circuit therefore reversed the district court and remanded with

93. *Id.*

94. *Id.* (citing Michael S. Jacobs & Ralph K. Winter, Jr., *Antitrust Principles and Collective Bargaining by Athletes: Of Superstars in Peonage*, 81 YALE L.J. 1, 16 (1971)).

95. *Clarett II*, 369 F.3d at 140 (quoting Intercontinental Container Transp. Corp. v. N.Y. Shipping Ass'n, 426 F.2d 884, 887–88 (2d Cir. 1970)).

96. *Id.* The court cited broad precedent establishing the validity of "hiring halls" as proof of its conclusion. *Id.* at 140–41.

97. *Id.* at 141.

98. *See id.* at 142.

99. *Id.* at 127. The 2011 NFL CBA does contain the modern eligibility rule in Article 6, § 2(b).

100. *Id.* at 142.

101. *Id.*

102. *Id.*

103. See *id.* at 142–43.

instructions to enter summary judgment in favor of the NFL.[104] The opinion also vacated the order of the district court designating Clarett as eligible for the 2004 NFL draft.[105]

IV. JUDGE SOTOMAYOR MISUNDERSTOOD THE NATURE OF THE ELIGIBILITY RULE AND THE DRAFT IN THE NFL

Clarett was only challenging the NFL's eligibility rule, alleging that the group boycott that refused to consider him for the NFL draft until a certain year occurred violated the Sherman Act. Clarett did not challenge the NFL draft itself, the rookie salary cap, the adequacy of his individual compensation, or any other term or condition of employment contained in the NFL CBA or the NFL Constitution and By-Laws. Therefore, the Second Circuit was wrong to analogize Clarett to a disgruntled job applicant.[106] He was not asking to be eligible for a job—he wanted to be eligible for the draft. The draft is a procedure unique to professional sports. Both the NBA and the NFL extensively scout all college players and medically examine and physically test all draft eligible players.[107] Every NFL team knew who Clarett was and extensively scouted him during his one year at Ohio State. Therefore, if Clarett had won his case, he would not have been guaranteed a job on an NFL team. He would have simply been subjected to the standard process of player evaluation that had already begun for him. Clarett was not deluded about his qualifications or bitter about an imaginary slight that cost him a career opportunity. Clarett would have been drafted in the early rounds of the draft if he was eligible.[108] The NFL did not dispute that fact. The NFL just arbitrarily told him that he needed to wait until the subsequent year's draft and employed a group boycott to enforce its decision.

A draft only has a predetermined number of selections. The NFL draft has

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104. *Id.*

105. *Id.*

106. *See id.* at 141. "But Clarett is in this respect no different from the typical worker who is confident that he or she has the skills to fill a job vacancy but does not possess the qualifications or meet the requisite criteria that have been set." *Id.* For an extensive critique on the inappropriateness of equating a uniquely qualified professional athlete to "a garbage man," see Christian Dennie, *Is Clarett Correct? A Glance at the Purview of the Antitrust Labor Exemption*, 6 TEX. REV. ENT. & SPORTS L. 1, 18–19 (2005).

107. *See* Kurt Helin, *NBA Draft Combine Starts Wednesday in Chicago... But What Does That Mean?*, NBC SPORTS (May 14, 2014), http://nba.nbcsports.com/2014/05/14/nba-draft-combine-starts-wednesday-in-chicago-but-what-does-that-mean/; Dave Siebert, *An Inside Look into the NFL Medical Exam Process at the Combine*, BLEACHER REP. (Feb. 21, 2014), http://bleacherreport.com/articles/1968230-an-inside-look-into-the-nfl-medical-exam-process-at-the-combine.

108. Clarett v. NFL (*Clarett I*), 306 F. Supp. 2d. 379, 388 (S.D.N.Y. 2004).

seven rounds with each team receiving one pick.[109] Therefore, there will be 224 players selected every year.[110] The NBA draft has only two rounds with each team receiving one pick.[111] Therefore, there will be sixty players selected every year. The number of rookies selected is constant regardless of how many players are eligible to be drafted. The CBAs do not expressly limit the number of undrafted rookie free agents a team may sign but effectively a ceiling is placed on that number due to roster limitations on the number of players a team may have under contract in the off season and the preseason training camp. Each NFL team may have a maximum of ninety players under contract during such period,[112] and each NBA team may have a maximum of twenty players under contract during such period.[113] Both numbers are constant and do not vary with the number of players eligible for the draft. Teams in both leagues are customarily at the maximum for the beginning of preseason training camp. Therefore, had Clarett been eligible for the draft, his presence would not have increased the number of rookies entering the league. He would have been added to a roster at the expense of another eligible rookie player.

Judge Sotomayor compounded her misunderstanding by supporting her result with four sports law cases that were distinguishable from Clarett's allegations—*Wood*, *Caldwell*, *Williams*, and *Brown*.[114] Although each of these cases contributed significantly to the legal evolution of the non-statutory labor exemption, none of them dealt with an eligibility rule and only *Wood* involved a draft.[115] The black letter law for which Judge Sotomayor cited them was not in dispute at the time of the *Clarett* decision or now. However, no case holds that all group activity by a multi-employer unit is exempt from an antitrust lawsuit by a member of a labor group. The cases indicate that some group activity by such a unit is exempt. The application of the exemption is therefore fact specific. The Second Circuit opinion does not explain why decisions unrelated to an eligibility rule should control the result in *Clarett*.[116]

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109. NFL CBA, *supra* note 9, at art 6, § 2(a).

110. It is possible for a few more players to be drafted in any given year because the NFL CBA provides for an additional round of compensation picks that provide compensation for any team losing an unrestricted free agent to another team. *Id.* This provision provides for a maximum of thirty-two additional selections. *See id.* Many years produced no compensation picks.

111. NBA CBA, *supra* note 11, at art X, § 3(a).

112. Matt Verderame, *NFL Roster Cut Deadlines and Rules*, SBNATION (Aug. 22, 2013), http://www.sbnation.com/nfl/2013/8/22/4647088/nfl-roster-cut-deadlines-rules-preseason.

113. Larry Coon, *Larry Coon's NBA Salary Cap FAQ*, NBA SALARY CAP FAQ, www.cbafaq.com//salarycap.htm#Q79 (last updated Mar. 20, 2016).

114. *See* Dennie, *supra* note 106, at 14–17.

115. *See id.*

116. Judge Sotomayor states that the eligibility rule is part of the complex process of draft, salary caps, and other devices by which wages in the NFL are determined. Clarett v. NFL (*Clarett II*), 369

In *Wood*, a drafted player sued the NBA, alleging that the NBA draft and the NBA salary caps lessened his individual compensation and therefore violated section 1 of the Sherman Act.[117] Wood argued that the exemption did not apply to his claims because the first prong of the *Mackey* test was not satisfied—the draft affected prospective players who had not signed an NBA contract and who were not yet a party to the collective bargaining relationship.[118] The draft and salary caps were agreements among horizontal competitors to eliminate competition in the market of college players.[119] The Second Circuit held that the exemption included the draft, salary cap, and other conditions of entry even if the union had effectively disadvantaged new union members to the betterment of senior union members.[120] Labor law and the collective bargaining process therefore controlled the compensation limits and job assignments of players entering the NBA.[121] However, the *Wood* challenge is not the one presented in *Clarett* even though the *Clarett* opinion treats it as if it were. Clarett did not challenge the draft or any salary cap terms—in fact, he desperately supports them. Wood was drafted and, after receiving a contract offer he considered inadequate, asked to be declared a free agent. Clarett is denied the opportunity to be considered for the immediate draft in spite of the fact that he is not qualified to play football in the only other similar alternative available to him—college football.[122]

In *Caldwell*, the plaintiff was the president of the players' association for the American Basketball Association.[123] He alleged that the league's teams violated the Sherman Act by agreeing as a group to release him and boycott his playing services in retaliation for his activities on behalf of the union.[124] The Second Circuit reasoned that the exemption should preclude Caldwell's claim because his allegations concerned the mandatory bargaining subject of hiring and firing employees.[125] His retaliatory discharge claims also involved activity

F.3d 124, 140 (2d Cir. 2004). The eligibility rule therefore cannot be viewed in isolation. *Id.* The fact specific nature of the exemption requires that the eligibility rule be viewed in isolation. *Id.* The complexity of various CBA terms is insufficient to override this requirement. *Id.*

117. Wood v. NBA, 809 F.2d 954, 956–57 (2d Cir. 1987).

118. *Id.*

119. *Id.* at 958.

120. *Id.* at 963.

121. *See id.* at 962–63.

122. Although the Canadian Football League is a professional league, the facilities, media exposure, and quality of are not equivalent to the NFL or major college football. *See* Rob Boffard, *The Little-Known Canadian Version of American Football*, BBC NEWS (July 2, 2015), http://www.bbc.com/news/business-33324426.

123. Caldwell v. Am. Basketball Ass'n, 66 F. 3d 523, 525 (2d Cir. 1995).

124. *Id.* at 526.

125. *See id.* at 528.

that was protected by federal labor law.[126] Both of these claims were subject to appropriate labor law remedies.[127] The exemption therefore applied and Caldwell should pursue redress in an appropriate labor forum and not seek compensation through antitrust litigation.[128] The *Caldwell* fact pattern is unrelated to Clarett's claims regarding the eligibility rule. Caldwell was a distinguished veteran player who was not only a long-standing member of the bargaining unit but also president of the union. The decision to prioritize labor law remedies over antitrust litigation was clearly justified by the Second Circuit's opinion. However, *Caldwell* does not, and should not, establish the proposition that all joint or group activity by a multi-employer unit is exempt from antitrust scrutiny. *Caldwell* does repeat the black letter law principle that some joint or group activity by a multi-employer unit is exempt from antitrust scrutiny.[129] In the determination of whether Clarett's allegations fall within the exempt type of group activity, the *Caldwell* fact pattern is easily distinguishable and the *Caldwell* result should have been given limited applicability.

In *Williams*, a class of current NBA players challenged the NBA's draft and salary cap as a violation of the Sherman Act.[130] The NBA CBA had expired, and the draft and salary cap were unilaterally implemented by management after negotiations with the players' union had reached impasse.[131] The central issue in the case, therefore, was whether the exemption expired when the CBA terminated or whether it continued until some later date.[132] The Second Circuit began its opinion by extolling the virtues of a multi-employer bargaining unit and its necessity in the efficient organization of the business and games of professional sports.[133] Unilateral implementation by management of a union rejected term was permitted by federal labor law.[134] Because the entire collective bargaining process was controlled in detail by labor principles, the *Williams* court held that antitrust liability for an employer was inappropriate and the exemption continued after the expiration of the CBA.[135] Other circuits have also decided that the exemption survived impasse and continued as long as a collective bargaining relationship existed.[136]

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126. *Id.* at 527–30.

127. *Id.* at 530.

128. *Id.*

129. *Id.* at 529–30.

130. NBA v. Williams, 45 F.3d 684, 685–86 (2d Cir. 1995).

131. *Id.* at 686.

132. *Id.* at 687–88.

133. *Id.* at 689.

134. *Id.* at 693.

135. *Id.*

136. *See, e.g.*, Powell v. NFL, 930 F.2d 1293, 1304 (8th Cir. 1989); Brown v. Pro Football, Inc., 50

In *Brown*, the Supreme Court agreed with the result in *Williams* and held that the exemption did immunize an employer from antitrust liability for unilaterally imposing proposed terms and conditions of employment after the expiration of a CBA and impasse with a union.[137] The NFL unilaterally implemented a provision permitting each team to have a "developmental squad" of players who had been waived by the league.[138] Such developmental players would not be able to negotiate their compensation individually but would all be paid a league-wide salary for each game on the squad.[139] A class of developmental players challenged the imposition of a non-negotiable NFL payment as a violation of the Sherman Act.[140] The Court echoed the *Williams* opinion by finding that allowing the imposition of antitrust liability after impasse would call into question much of the conduct of a multi-employer bargaining unit that was regulated in detail by federal labor laws.[141] Federal courts ruling in an antitrust context should not be able to usurp the National Labor Relations Board's (NLRB) responsibility for policing the collective bargaining process.[142] The exemption therefore continued for as long as a collective bargaining relationship existed between an employer and a union.[143] The *Clarett* opinion noted that *Wood*, *Caldwell*, and *Williams* were consistent with *Brown* and therefore would be regarded as controlling precedent.[144]

Unfortunately, as the above analysis demonstrates, the four decisions cited by Judge Sotomayor were not directly relevant to the resolution of Clarett's case. While the *Williams* and *Brown* opinions were significant in defining the termination of the exemption, that issue was not raised by the *Clarett* facts. *Caldwell*'s holding that a retaliatory discharge claim was exempt from antitrust liability was equally inapposite to Clarett's complaint. Although *Wood* is the closest to relevance, his challenge to the draft and rookie salary cap provisions

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F.3d 1041, 1058 (D.D.C. 1995). The *Powell* result forced the NFLPA to decertify as a union and terminate its collective bargaining relationship with the NFL. At that point, the exemption expired.

137. Brown v. Pro Football, Inc., 518 U.S. 231, 240–42 (1996).

138. *Id.* at 234–35.

139. *Id.*

140. *Id.* at 235.

141. *Id.* at 237–42.

142. *Id.* at 240–42. *Brown* has been characterized as exempting a familiar multi-employer bargaining tactic regarding a mandatory subject of bargaining that is permitted and regulated by the NLRB. *See* Cal. *ex rel.* Brown v. Safeway, Inc., 615 F.3d 1171, 1195–96 (9th Cir. 2010). As such, the exemption protects activity that is essential to the collective bargaining process. *See id.*

143. *Brown*, 518 U.S. at 250. Years after the *Brown* decision, the NFLPA again decertified to ensure that the exemption did not apply to a threatened antitrust lawsuit and to increase its leverage in collective negotiations. *League Locks Out Players After Union Decertifies*, NFL (Mar. 11, 2011), http://www.nfl.com/news/story/09000d5d81eb6e46/article/league-locks-out-players-after-union-decertifies.

144. Clarett v. NFL (*Clarett II*), 369 F.3d 124, 138 (2d Cir. 2004).

much more clearly involved terms and conditions of employment collectively negotiated by the league and union. In fact, Judge Sotomayor specifically noted that Clarett does not argue that *Brown* cast doubt on *Wood*, *Caldwell*, or *Williams*.[145] Both parties essentially agreed that the precedent cited held that some, but not all, group activities by a multi-employer unit are exempt from antitrust scrutiny.[146] However, the cited cases did not provide any guidance as to whether the eligibility rule fell within the exempted activity parameters or not.

By repeatedly characterizing the eligibility rule as a "criteria for player employment,"[147] the *Clarett* opinion mischaracterizes the complaint at issue. Eligibility for the draft is not the same as eligibility for a job in the unique setting of professional sports. Clarett was not asking for a job—he was asking for the chance to be tested. Sotomayor's analogy to a union hiring hall perpetuates the misconception.[148] The hiring hall has been approved in certain multi-employer industries ("most notably maritime, longshoring and construction") when a union acts essentially as a job referral service for union members on short-term employment.[149] The employees serviced are union members and part of the bargaining unit. The hiring hall has no relation to professional sports. If an employer can be compared to a union-run entity, the NFL is essentially saying to prospective players "you are highly qualified and we have jobs but come back next year." That was the repudiated position of union hiring halls in the docks of New York and New Jersey when they were controlled by criminals in the 1950s.[150] No hiring hall would be permitted to foreclose workers on such a basis in modern America.[151] Similarly, the NFL's group boycott arbitrarily denied Clarett the chance to be turned down for a job (fully knowing he would not be turned down), which should not be allowed.

V. JUDGE SOTOMAYOR IMPROPERLY REJECTED THE *MACKEY* TEST AND THEN INCORRECTLY APPLIED THE *MACKEY* PRINCIPLES

The district court applied the three-part *Mackey* test and found the eligibility rules failed to satisfy any of the *Mackey* factors.[152] The Second

145. *Id.*

146. *See id.*

147. *Id.* at 141.

148. *Id.* at 140–41.

149. *See* Milstein, *supra* note 8, at 244.

150. A position similar to a scene from the movie ON THE WATERFRONT (Horizon Pictures 1954).

151. *See* Kevin W. Brooks, *"Physically Ready to Compete": Can Players' Unions Bar Potential Draftees Based on Their Age?*, 21 SPORTS LAW. J. 89, 122 n.221 (2014).

152. *Clarett II*, 369 F.3d at 133.

Circuit reversed the district court on this issue and explicitly rejected the *Mackey* test when a plaintiff's allegations only claimed an anticompetitive effect on a collective bargained labor market rather than a product market.[153] However, the precedent cited by Judge Sotomayor does not support the inapplicability of *Mackey* in a labor market context. The district court in *Wood* explicitly relied on the three-prong *Mackey* test in its analysis.[154] The Second Circuit affirmed the district court opinion and never disagreed with the *Mackey* test applied by the lower court.[155] In addition, the appeals court clearly discusses two of *Mackey*'s requirements—whether the rookies are parties to the collective bargaining relationship[156] and whether the draft is a mandatory subject of bargaining.[157] The *Williams* opinion also effectively utilizes *Mackey* concepts.[158] The Second Circuit inferred that players not yet under contract were still part of the collective bargaining relationship.[159] A significant amount of the opinion also deals with the characterization of the alleged restraints as mandatory subjects of bargaining.[160] Finally, the *Williams* opinion cites *Powell v. NFL*[161] favorably to support its conclusion.[162] *Powell* is an Eighth Circuit decision that relied extensively on the *Mackey* test it previously created.[163] The *Clarett* opinion also fails to mention that the *Mackey* test was explicitly utilized in labor market cases in the Sixth, Eighth, Ninth, and D.C. Circuits.[164]

Mackey is also consistent with Supreme Court precedent. The *Clarett* opinion has a peculiar relationship with the non-*Brown* Supreme Court cases. Judge Sotomayor first states that these cases are of limited assistance in determining the reach of the exemption in labor market cases because they all dealt with antitrust injuries to employers.[165] However, in determining the best alternative to *Mackey*, she cites a Second Circuit case that relies on the exemption principles of *Jewel Tea*.[166] However, Judge Sotomayor also

153. *Id.* at 134.

154. Wood v. NBA, 602 F. Supp. 525, 528 (S.D.N.Y. 1984).

155. *See generally* Wood v. NBA, 809 F.2d 954 (2d Cir. 1987).

156. *Id.* at 960.

157. *Id.* at 962–63.

158. *See generally* NBA v. Williams, 45 F.3d 684 (2d Cir. 1995).

159. *See id.* at 693.

160. *Id.* at 691.

161. 930 F.2d 1293 (8th Cir. 1989).

162. *Williams*, 45 F.3d at 692–93.

163. *Powell*, 930 F.2d at 1298–1300.

164. *See supra* note 35 and accompanying text. *See generally* Clarett v. NFL (*Clarett II*), 369 F.3d 124 (2d Cir. 2004).

165. *Clarett II*, 369 F.3d at 134.

166. *Id.* at 133 (citing Local 210, Laborers' Int'l Union v. Labor Relations Div. Associated Gen. Contractors of Am., 844 F.2d 69, 80 n.2 (2d Cir. 1988)).

acknowledges the commonly accepted position that the three-part test in *Mackey* was specifically derived from Justice White's opinion in *Jewel Tea*.[167] The opinion's treatment of *Brown* is equally confusing. The opinion frequently cites *Brown* as supporting its holding but also admits that *Brown* left the contours of the exemption undefined and expressed some reservations about the lower court's broad reading of the exemption as insulating all labor market restraints from antitrust scrutiny.[168] The *Clarett* opinion also fails to cite the actual test enunciated in *Brown*, which is analogous to the *Mackey* test.[169] The Supreme Court precedent does not support the *Clarett* conclusion that the *Mackey* test should not be utilized in a case alleging only injury in the labor market.

However, if Judge Sotomayor stated that *Mackey* was not to be utilized in *Clarett*, what test did she use instead of *Mackey*? The opinion indicates that she, in fact, used *Mackey* test principles. The decision begins by stating that the *Mackey* test is inappropriate and the first proper factor indicating the exemption should not apply is that the alleged restraint is in the labor market and not in the product market.[170] However, this is simply a different way of formulating the first prong of *Mackey*—the restraint must primarily affect only those who are parties to the collective bargaining relationship. If the activity at issue is affecting individuals or entities outside the bargaining relationship, the restraint is by definition in the product market. The opinion then analyzes whether the eligibility rules are mandatory subjects of bargaining[171]—an inquiry identical to the second prong of *Mackey*. Finally, the decision concludes by holding that the NFL's Constitution and By-Laws (which contained the eligibility rule at the time of the appeal)[172] were present at the collective negotiations between the NFL and the NFLPA.[173] The court held that knowledge of the provision combined with the NFLPA's waiver of the right to sue the NFL contained in the NFL CBA made it "clear that the union and the NFL reached an agreement with respect to how the eligibility rules would be handled."[174] This is simply a reformulation of the third prong of the *Mackey* test—the restraint at issue must be the product of bona fide arm's length bargaining. Despite Judge Sotomayor's repudiation of the *Mackey* test in

167. *Clarett II*, 369 F.3d at 134.

168. *Id.* at 138.

169. *See generally Clarett II*, 369 F.3d at 124.

170. *Id.* at 133–34.

171. *Id.* at 140–41.

172. The 2011 NFL CBA explicitly includes the modern eligibility rules. *See* NFL CBA *supra* note 9 and accompanying text.

173. *Clarett II*, 369 F.3d at 142.

174. *Id.* at 142.

Clarett, she in fact employed it.

Whether *Mackey* is directly applied or an altered formulation of *Mackey* is used, the Second Circuit improperly applied the applicable exemption principles. The *Mackey* decision held that, if any one of the three elements of the test was not met, the exemption would be denied and antitrust liability was possible.[175] Therefore, even if the *Clarett* opinion was correct that the eligibility rules were the product of good faith bargaining, the exemption should be denied if the restraint affected parties outside of the bargaining relationship or the eligibility rules were not mandatory subjects of bargaining.[176]

As noted above, the *Clarett* opinion stated that the *Mackey* test was only applicable when the restraint affected the competition in the product market, not the labor market.[177] The district court in *Clarett* spoke in *Mackey*'s terms by concluding that prospective players were outside of the bargaining relationship, and therefore the first requirement of the *Mackey* test was not satisfied.[178] Although they reached different results on the exemption's applicability, both opinions focused on the relationship between a prospective player and the bargaining unit. The district court held that Clarett was outside of the bargaining unit,[179] while the court of appeals held that the restraint at issue only affected the labor market.[180] Judge Sotomayor concluded

> [t]his is simply not a case in which the NFL is alleged to have conspired with its players union to drive its competitors out of the market for professional football. . . . Nor does Clarett contend that the NFL uses the eligibility rules as an unlawful means of maintaining its dominant position in that market.[181]

Regardless, however, of which result is correct,[182] both opinions neglect the

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175. Mackey v. NFL, 543 F.2d 606, 615–18 (8th Cir. 1976). The *Mackey v. NFL* court denied the exemption because the Rozelle Rule was not the product of good faith bargaining. *Id.* at 616. Even though the first two prongs were met, the players still won. *Id.* at 623.

176. This Article assumes that the eligibility rules were the product of bona fide, good faith bargaining. Even if such a conclusion was incorrect in *Clarett*, the inclusion of the eligibility rules in both the current NFL CBA and NBA CBA justify the propriety of such an assumption.

177. No Supreme Court case explicitly makes such a distinction between the labor and product market
regarding the exemption. Milstein, *supra* note 8, at 234.

178. Clarett v. NFL (*Clarett I*), 306 F. Supp. 2d. 379, 395–96 (S.D.N.Y. 2004).

179. *See id*.

180. Clarett v. NFL (*Clarett II*), 369 F.3d 124, 134 (2d Cir. 2004).

181. *Id.* (citations omitted) (citing United Mine Workers of Am. v. Pennington, 381 U.S. 657, 665 (1965); Allen Bradley Co. v. Local Union No. 3, Int'l Bhd. of Elec. Workers, 325 U.S. 797, 809 (1945)).

182. The Author believes the district court has the more persuasive argument on this issue.

most important issue posed by the eligibility rule—the relationship between the NFL (and the NBA) and the NCAA. By focusing on Clarett's relationship to the NFL, the district court failed to see that the parties affected outside the bargaining unit were also the NCAA and potential competitors to the NFL. The court of appeals did not understand that the eligibility rule impacts the product market because the rule benefits college football and strengthens the NFL's ability to foreclose entry-level competition. In the language of *Jewel Tea*, the case cited by Judge Sotomayor as controlling, the eligibility restraints are "at the behest of . . . [a] non-labor group[]" and therefore the exemption should not apply.[183]

The eligibility rule supports the current revenue structure of college football and basketball. By keeping stars in college for either three years (football) or one year (basketball), college teams have increased ticket prices, sold record amounts of merchandise, and signed multi-billion dollar media contracts.[184] Much of this ever-increasing revenue stream would be imperiled if the best football and basketball players were not forced to attend college. Financial concerns are at least one of the reasons why the NCAA consistently pressures the NBA to increase the mandated years in college from one to two or three years.[185] The NCAA is, in *Mackey* terms, an outsider to the collective bargaining relationship and, in *Clarett* terms, an entity in the product, not the labor, market.

Why would the NFL and the NBA want to protect the financial stability of the NCAA, an organization with which they are not affiliated? The NCAA serves as the equivalent of baseball's minor leagues for both sports, but with the added benefit of handing to each league players who are already stars. The increased media attention to both the NFL and the NBA drafts affirms the importance of having players enter the leagues who are already famous.[186] In addition, the NFL and the NBA do not incur the costs of running a full minor league developmental system as Major League Baseball teams are required to do.[187] This arrangement is particularly important to the NFL because the risk of

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183. Local Union No. 189, Amalgamated Meat Cutters & Butcher Workmen v. Jewel Tea Co., 381 U.S. 676, 689–90 (1965).

184. *See, e.g.*, Eric Chemi, *The Amazing Growth in College Football Revenues*, BLOOMBERG (Sept. 27, 2013), http://www.bloomberg.com/bw/articles/2013-09-26/the-amazing-growth-in-college-football-revenues.

185. New, *supra* note 15.

186. *See* Ed Sherman, *ESPN's Chris Berman Has Seen NFL Draft's Popularity Soar*, CHI. TRIB. (Apr. 26, 2015), http://www.chicagotribune.com/sports/columnists/ct-nfl-draft-espn-sherman-media-spt-0427-20150426-column.html.

187. The NBA does support the "D-League" for developmental players. *NBA Development League: DLeague FAQs*, NBA D-LEAGUE, http://www.nba.com/dleague/santacruz/dleague_faqs.html (last visited June 9, 2016). The D-League is not a true minor league in that star or even good NBA players

a debilitating injury in three years of college football is significant.[188] If the NFL had its own minor league system, the teams would be paying signing bonuses and salaries to players for three years after high school graduation. If a player was injured during that period, the team would absorb the financial loss. If a player gets hurt in college under the current system, the medical costs are borne by the school, the job risk is on the player, and there are no economic consequences for the NFL teams.[189] Financially stable college football and basketball programs therefore significantly lower costs for both the NFL and the NBA and save them millions of dollars in risk avoidance. Both of these financial benefits increase the profitability of teams in each league. Being handed pre-made marketable stars also increases the revenue of both leagues.[190]

In classic economic and antitrust theory, higher profits and increasing revenue by a monopolist should produce entry-level competition that reduces prices and enhances efficiency.[191] In professional football and basketball, lower costs and increased revenue means that both the NFL and the NBA have more money to spend on player salaries and related costs and practice and playing facilities. Higher player salaries and better facilities create ever higher barriers to entry-level competition. Despite an enormous increase in the profitability and market value of all NFL and NBA teams in the last two decades, no new professional league in either sport has arisen to challenge the NFL and NBA's respective monopoly. Instead, ticket prices and media payments in both sports increase annually and, correspondingly, the monopolists in each league get wealthier. In part because of the alliance with the NCAA, entry-level competition in professional football or basketball is cost prohibitive. These results are inconsistent with the goals of federal antitrust law.[192]

The current arrangement therefore incentivizes the NFL, the NBA, the NFLPA, and the National Basketball Association Players Association (NBAPA) to continue the restrictive eligibility rules already in place, or, in the case of professional basketball, make them more restrictive. Both the universities and the leagues profit enormously from the current eligibility rules. The only people injured by this structure are the prospective players like Clarett.

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never appear in it. The D-League is designed for players hoping to become fringe players in the NBA. *See id.*

188. *See, e.g.*, Jeffrey Perkel, *High School, College Football Comes with Risk*, ABC NEWS (Mar. 23, 2007), http://abcnews.go.com/Health/Healthday/story?id=4508074&page=1.

189. Milstein *supra* note 8, at 226. The article notes that "Major League Baseball teams each spend [approximately $9] million annually [on] their minor league" affiliates. *Id.*

190. *See, e.g.*, *Tim Tebow Is Slightly Less Marketable Than Oprah, but Is a Slightly Better Quarterback*, YAHOO SPORTS (Mar. 27, 2012), http://sports.yahoo.com/blogs/nfl-shutdown-corner/tim-tebow-slightly-less-marketable-oprah-slightly-better-213040534.html.

191. *See* Christopher R. Leslie, *Trust, Distrust, and Antitrust*, 82 TEX. L. REV. 515, 525 (2004).

192. *See id.*

The prospective players alone bear the risk of injury and the loss of three years or one year worth of income. The lost income is particularly injurious to football players who have a much shorter professional life.[193] Given the limited time in which a professional athlete is at his peak, the players can never recover the income they have lost.

Judge Sotomayor's statement at the conclusion of the *Clarett* opinion is therefore simply wrong. *Clarett* is a case in which the NFL conspired with the players' union to drive competitors out of the market for professional football. *Clarett* is a case in which the NFL was using unlawful means to maintain its dominant position in the market of professional football. In that context, federal antitrust policies trump incidental labor law benefits.[194] The exemption should have been denied for failing the first requirement of the *Mackey* test or for its impact on both the labor and the product market, depending on which language is preferred. Clarett alleged a conspiracy to restrain trade that extended well beyond player wages.[195] Exemption is inappropriate for restraints that have significant impact in the product market even if they also have an impact in the labor market.[196]

In addition, both the district court and the court of appeals agreed that the eligibility rule must be a mandatory subject of bargaining for the exemption to apply. The district court found that the eligibility rule was not such a mandatory subject because it did not address wages, hours, or terms and conditions of employment.[197] The court noted that the rules made a class of players unemployable while mandatory subjects of bargaining apply only to those who are employed or eligible for employment.[198] *Wood*, *Caldwell*, and *Williams* all involved employed or drafted players and were therefore cited as consistent with the district court's distinction.[199] The court of appeals held that the eligibility rule was a mandatory subject of bargaining.[200] The opinion noted that the

193. Nick Schwartz, *The Average Career Earnings of Athletes Across America's Major Sports Will Shock You*, FOR THE WIN (Oct. 24, 2013), http://ftw.usatoday.com/2013/10/average-career-earnings-nfl-nba-mlb-nhl-mls. Current thinking is that a football running back only has so many carries in his body, counting his collegiate and professional athletic life. Neil Greenberg, *Running Backs' NFL Careers Are Getting Shorter and Their Impact Lessened*, WASH. POST (Mar. 10, 2015), http://ftw.usatoday.com/2013/10/average-career-earnings-nfl-nba-mlb-nhl-mls.

194. *See* Connell Constr. Co. v. Plumbers & Steamfitters Local Union No. 100, 421 U.S. 616, 625–26 (1975).

195. Clarett v. NFL (*Clarett I*), 306 F. Supp. 2d 379, 382 (S.D.N.Y. 2004).

196. *See Connell Construction Co.*, 421 U.S. at 622–23; Am Steel Erectors, Inc. v. Local Union No. 7, Int'l Ass'n of Bridge Workers, 536 F.3d 68, 79 (1st Cir. 2008).

197. *Clarett I*, 306 F. Supp. 2d at 393–95.

198. *Id.* at 393.

199. *Id.* at 394–95.

200. Clarett v. NFL, 369 F.3d 124, 139 (2d Cir. 2004).

eligibility rule had a tangible effect on the wages of current NFL players because they are part of a complex scheme by which individual salaries in the NFL are determined.[201] The eligibility rules could therefore not be viewed in isolation because they were part of the economic assumptions that supported the entire NFL CBA.[202] The opinion concluded by noting that the eligibility rule diminished a veteran player's risk of being replaced by either a drafted rookie or an undrafted rookie free agent.[203]

The rationales given by Judge Sotomayor to support her conclusion that the eligibility rule is a mandatory subject of bargaining again reveal a misunderstanding of how the NFL actually works. As noted previously, the number of drafted rookies is determined by the CBA itself.[204] The number of undrafted rookie free agents is effectively defined by the ninety-player limit on training camp rosters placed on each team. These limits are consistently applied regardless of the number of players eligible for the draft. The effect of additional players eligible for the draft is only to increase marginally (1) the time and money a team spends on scouting prospective players and (2) the number of eligible players invited to the NFL Combine. Judge Sotomayor's second rationale is therefore misplaced. Precluding Clarett from eligibility does not diminish the risk a veteran player faces of being replaced by a rookie. The veteran is going to face the exact same number of rookies competing for his job regardless of the size of the eligibility pool. The only argument that supports the rationale is that, even though the numbers are the same, the quality of the rookie player pool is reduced by eligibility restrictions and veterans would face lessened competition from such less gifted players. However, such talent disparities are a fact of life under the current eligibility rule as the pool of prospective players are labeled in some years as "strong" and other years as "weak."[205] If the eligibility rule was declared an antitrust violation, the talent disparity would be most likely to occur in the first year of expanded eligibility and would then return to the normal ebb and flow of annual talent assessment. The infrequency of such a quality reduction occurring beyond the current norm if the eligibility pool was expanded renders it of marginal utility in the assessment of whether the eligibility rule is a mandatory subject of bargaining. Judge Sotomayor's second rationale does not support her conclusion in this regard.

The opinion's first rationale also does not support its conclusion that the

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201. *Id.* at 140.

202. *Id.* The complexity argument is unpersuasive. *See supra* note 116 and accompanying text.

203. *Clarett II*, 369 F.3d at 140.

204. *Supra* notes 109-11 and accompanying text.

205. *See, e.g.*, RedRev, *2016 NBA Draft Class Preview*, PEACHTREE HOOPS (Oct. 1, 2015), http://www.peachtreehoops.com/2015/10/1/9421155/2016-nba-draft-class-preview-atlanta-hawks.

eligibility rule is a mandatory subject of bargaining. The salary caps contained in the NFL CBA in force at the time of the *Clarett* decision were in effect total team caps. The rationale therefore had more validity then as higher rookie compensation, at least hypothetically, took a larger percentage of the available cap available to veterans. In fact, however, the rookie salaries frequently increased veteran compensation as the teams struggled to justify paying unproven players more than established NFL stars. During the period those earlier NFL CBAs were in effect, veteran player salaries increased every year.[206] However, even if an increase in veterans' wages is considered an effect of the rookie salaries permitted by the CBA in effect at the time of *Clarett*, the effect had nothing to do with the eligibility rule. Rookie compensation at that time was determined by NFL revenue (which determined the team salary cap) and the draft position of the individual player. The size or quality of the pool from which players were drafted did not influence general rookie compensation or, by cause and effect, veteran wages.

The rationale employed by Judge Sotomayor has even less validity in today's NFL. The current CBA—the 2011 NFL CBA—provides in detail for a Total Rookie Compensation Pool and a Year-One Rookie Compensation Pool for both the entire NFL and for each individual team.[207] These amounts are annually determined by a detailed process contained within the CBA.[208] As part of those calculations, each pick in the draft is given a suggested compensation number and undrafted free agent compensation is regulated in detail.[209] These cap limits completely divorce the rookie compensation packages from the amount of money available to veterans. These rookie compensation restrictions are also completely unrelated to the number of players eligible for the draft. If the eligibility rules were invalidated and more players were eligible for the draft, the amount of the rookie caps would not increase by $1. The rationale was not persuasive when written. Its logic cannot be justified under current NFL and NBA conditions. The district court in *Clarett* was correct in its assertion that a rule rendering someone unemployable cannot be included within a subject that only relates to those employed.[210] The eligibility rule is not a mandatory subject of bargaining. The restriction is a group collaboration between the leagues, the unions, and the NCAA to maintain profits and a monopoly position in the professional football market by restraining trade.

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206. *See* Mike J. Perry, *Rising Income Inequality and the NFL Part 2*, AEIDEAS (Sept. 30, 2010), http://www.aei.org/publication/rising-income-inequality-and-the-nfl-part-2/.

207. NFL CBA, *supra* note 9, art 7 § (1)(c)–(d).

208. *Id.*

209. *See id.* art 7.

210. Clarett v. NFL (*Clarett I*), 306 F. Supp. 2d. 379, 393–95 (S.D.N.Y. 2004).

VI. IF THE EXEMPTION DOES NOT APPLY, THE ELIGIBILITY RULES VIOLATE SECTION 1 OF THE SHERMAN ACT

If the exemption is inapplicable, the validity of the restraints would again be suspect pursuant to the reasoning in *Haywood*. The district court was correct in holding that, if the exemption did not apply, section 1 of the Sherman Act would only be violated if Clarett proved that he suffered an appropriate antitrust injury and that the eligibility rule was an unreasonable restraint of trade.[211] "Antirust injury" means that Clarett must have sustained an injury the antitrust laws were intended to prevent, caused by the defendants' unlawful activity.[212] The Supreme Court has also indicated that an unreasonable restraint in the sports industry needed to be proven under the Rule of Reason analysis.[213] The per se rule of liability was inappropriate in sports given the uniqueness of the industry and its particular need for joint or group activity to exist.[214]

Clarett had an antitrust injury because he alleged a group boycott that created a barrier to entry in the labor market.[215] He is not claiming that he was harmed because he lost his job in a competitive environment. The eligibility "[r]ule[s] preclude[d] Clarett from entering into [a] 'fair and vigorous competition'" for employment.[216] He properly identified the relevant market as the NFL labor market for player services.[217] The district court concluded "Clarett's own injury—his inability to compete in the market—stems from defendant's activities."[218] Clarett therefore satisfied the Supreme Court's criteria for antitrust standing and injury. If the argument noted above that the restraint affects both the labor and the product market is accepted, the required antitrust injury is even clearer.

Clarett also properly alleged an unreasonable restraint of trade pursuant to section 1 of the Sherman Act. The eligibility rule was clearly the product of concerted or group activity by the thirty-two teams of the NFL, with at least the tacit approval of the NFLPA.[219] Therefore, section 1's requirement of concerted action between at least two legally distinct entities was satisfied.[220] Although a group boycott is normally a per se violation of section 1, because history has

211. *Id.* at 403–04.

212. *See* Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489 (1977).

213. NCAA v. Bd. of Regents, 468 U.S. 85, 100–03 (1984).

214. *Id.* at 100–01.

215. *Clarett I*, 306 F. Supp. 2d. at 399.

216. *Id.* at 401.

217. *Id.*

218. *Id.* at 403.

219. Clarett v. NFL (*Clarett II*), 369 F.3d 124, 134–37 (2d Cir. 2004).

220. *Clarett I*, 306 F. Supp. 2d at 404.

proven that they are overwhelmingly likely to be anticompetitive, the district court properly employed the Rule of Reason test required by *Board of Regents* in the context of the sports industry.[221] Under that analysis, the plaintiff has the burden of proving that the restraint at issue has an adverse effect on competition in the relevant market.[222] If the plaintiff satisfies this obligation, the burden is on the defendants to prove that procompetitive benefits of the restraint outweigh the anticompetitive effects.[223] If the defendant meets that burden, the plaintiff may show that the defendants' procompetitive effects could have been produced by less restrictive alternatives that would produce no or less anticompetitive impact.[224]

Clarett easily satisfied his burden of proving an adverse effect on competition because, even at common law, an agreement that precluded an individual from practicing his chosen profession was invalid in the absence of some form of compensation.[225] "Age-based eligibility restrictions in professional sports are anticompetitive because they limit competition in the player personnel market by excluding sellers."[226] The district court therefore focused its attention on the NFL's four pro-competitive benefits of the eligibility rule—protecting less mature players from the greater risk of injury in NFL games, protecting the NFL's product from the adverse consequences from such injuries, protecting the NFL clubs from the costs and potential liabilities of such injuries, and protecting from injury and self-abuse adolescents who might over train or use performance-enhancing drugs to play sooner in the NFL.[227] The district court dismissed out of hand the first and fourth of the benefits by concluding that although they were laudable concerns, they had nothing to do with promoting competition.[228] Therefore, they did not qualify as pro-competitive benefits.[229] The second and third benefits were also unpersuasive.[230] Cost savings manifested themselves in the product market, not the labor market.[231] Their impact was therefore irrelevant in the labor market

221. *Id.* at 404–05.

222. *Id.* at 404.

223. *Id.* at 405.

224. *Id.* at 405–06.

225. Such agreements are usually found in the context of covenants not to compete. *See generally* Phillip J. Closius & Henry M. Schaffer, *Involuntary Nonservitude: The Current Judicial Enforcement of Employee Covenants Not to Compete—A Proposal for Reform*, 57 S. CAL. L. REV. 531 (1984).

226. *Clarett I*, 306 F. Supp. 2d at 406.

227. *Id.* at 408.

228. *Id.*

229. *Id.*

230. *Id.* at 408–09.

231. *Id.* at 409. The NFL's cost savings justifications under the Rule of Reason test effectively confirm that the exemption should be denied because it has effects beyond the labor *market*. *Id.*; *see*

alleged by Clarett.[232] In addition, a group boycott that keeps costs down is almost always cited as an adverse impact on the relevant market.[233] The district court refused to accept that an anticompetitive restraint could somehow be turned into a pro-competitive benefit.[234] "Indeed, the vast majority of anticompetitive policies are instituted because they will be profitable to the violators."[235]

The district court concluded by noting that the pro-competitive benefits, if any, of the eligibility rules could be accomplished by less restrictive alternatives.[236] If the pro-competitive effects are all based on a concern that younger players are not physically or mentally ready to play in the NFL, age is "a poor proxy" for being ready to play in the NFL.[237] Because such readiness is concededly a case-by-case decision, medical examinations and tests that measure an individual's maturity are better ways to determine a player's ability to be successful in the NFL.[238] The NFL was, in fact, already performing such examinations and tests in their extensive efforts to provide the teams with the most complete information possible to assist in their decision whether a prospect was worth selecting in the draft. The district court properly granted Clarett's motion for summary judgment, declared the eligibility rules to be a violation of section 1 of the Sherman Act, and ordered that Clarett was eligible to participate in the 2004 NFL draft.[239]

VII. CONCLUSION

The right to pursue a useful occupation has been a cherished right from the beginnings of America.[240] Judge Sotomayor deprived collegiate football and basketball players of that right in an opinion that was wrong when it was written and more inappropriate in the modern world of professional sports. *Clarett* incorrectly applied the law it cited as relevant. The cases employed in the opinion properly establish that some multi-employer group activity is exempt from antitrust liability. Judge Sotomayor essentially derived from those holdings that all multi-employer group activity is exempt from an antitrust lawsuit by a labor group if it relates to a mandatory subject of bargaining. Such

also supra notes 120–30 and accompanying text.

232. *Id.*

233. *Id.* at 399.

234. *Id.* at 409.

235. *Id.*

236. *Id.* at 410.

237. *Id.*

238. *Id.*

239. *See id.* at 410–11.

240. *See* Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

an expansion is unprecedented, especially when applied to prospective players who are not members of the union, not employees of the NFL, and not members of the bargaining unit. In addition, the eligibility rule is not a mandatory subject of bargaining because it is unrelated to wages, hours, or terms and conditions of employees.

Clarett also errs in its failure to assess the relationship between the NFL and college football. The eligibility rule supports monopoly profits for both the NFL and the universities of Division I of the NCAA. At the same time, the rule is a barrier to entry-level competition in the market of professional football. No other case has ever permitted such a blatant violation of the Sherman Act to escape antitrust liability through the non-statutory labor law exemption. In such a context, antitrust policies and goals must outweigh the labor law interests, if any, that are relevant.

Finally, the *Clarett* result is particularly egregious if it is applied to the modern NFL or NBA. Under the current collective bargaining agreements in both leagues, rookies cannot affect veteran wages and the size of the draft eligibility pool cannot affect veteran job security. Finally, rookie compensation in the NFL and NBA has escalated dramatically since 2004. Forcing a prospective player to miss up to three years of NFL income or one year of NBA income costs him millions of dollars he can never recoup. The modern impact of the *Clarett* decision permits the members of the group boycott to make hundreds of millions of dollars in monopoly profits at the expense of prospective players. The eligibility rule should be declared a violation of section 1 of the Sherman Act, and the common law right of all Americans to pursue an occupation of their choice should be reaffirmed.